91-1172

Supreme Court, U.S.
FILED
MAR 9 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

RAEFORD D. WADE,

Petitioner,

vs.

SECRETARY OF THE ARMY,

Respondent.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

LEONARD M. TUGGLE, JR.
JAMES F. FINDLAY
Counsel for Petitioner
Post Office Box 204354
Martinez, Georgia 30917
(404) 860-6966

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I

A. Where a title VII Plaintiff carries his initial burden under the act and establishes a prima facie case of racial discrimination in the repeated denial of GS-11 positions by undisputed testimony, does the act further require him to produce the original GS-11 applications before he can recover?

B. When there is a conflict between the United States Constitution and a federal rule of evidentiary procedure, does the Constitution prevail?

No. _____

In The

Supreme Court of the United States

October Term, 1991

RAEFORD D. WADE,

Petitioner,

vs.

SECRETARY OF THE ARMY,

Respondent.

Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on October 31, 1991 (See App. 1).

JURISDICTION

Jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1) and Rule 13 of this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and Statutory Provisions relied upon in the Petition for Writ of Certiorari are the 5th and 9th Amendments to the United States Constitution and title VII of the 1964 Civil Rights Act.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property,* without due process of law; nor shall private property be taken for public use, without just compensation. Amend 5, U.S.C.

The enumeration of the Constitution, of certain rights, shall not be construed *to deny of disparage others retained by the people.* Amend 9, U.S.C.

STATEMENT OF THE CASE

Petitioner brought a discrimination action pursuant to Title VII of the Civil Rights Act in the United States District Court, Southern District of Georgia, Augusta Division. After preliminaries, a bench trial was held on May 29, 1990, during which time, Petitioner presented clear evidence of racial discrimination by his being repeatedly denied GS-11 positions, for which he had applied, by the Respondent. The Trial Court found that

Petitioner had established a prima facie case of racial discrimination by showing that he belonged to a racial minority, that he applied for and was qualified for these GS-11 positions. That following his rejections, the positions remained open and Respondent continued to accept applications from white applicants whose qualifications did not exceed those of Petitioner. (T-79) (T-77).

That despite his prima facie showing and the undisputed and uncontroverted testimony establishing same, the Trial Court ruled that Petitioner had to introduce the original GS-11 applications into evidence or was barred from recovery. See 28 U.S.C.A. Section 1733 (I). The Trial Judge granted a directed verdict to Respondent on the grounds that *McDowell vs. Green,* 411 U.S. 792, 93 S.CT. 1817 (1973)(5) compelled him to do so.

That careful review of the text of the *McDowell Case* and *Title VII* requirements revealed no legal principle or rule absolute that the original applications had to be introduced.

That judgment was affirmed by the Eleventh Circuit Court of Appeals (App. 2).

The principle being established by the District Court and the Eleventh Circuit Court of Appeals deprives Petitioner of his liberty and property in violation of *Amend 5, U.S.C.* and *Amend 9, U.S.C.* which reserves to Petitioner the right to pursue advancement in the job market consistent with his qualifications without regard to race, color or origin.

In arguendo, even if the Trial Court is correct, and the original employment applications should have been

introduced, then an employer may defeat the intent of the law simply by destroying the applications. Thus forever denying any applicant from recovering under a Title VII action.

REASONS FOR GRANTING THE PETITION

If Certiorari is granted, Petitioner will brief this Court on how rules of evidence were not meant for the purpose of denying one his constitutional and *Title VII* rights and how the original applications mentioned played no crucial part in Petitioner's case.

Respectfully submitted,

LEONARD M. TUGGLE, JR.
Attorney for Petitioner
State Bar No. 718367

Post Office Box 204354
Martinez, Georgia 30917
(404) 860-6966

JAMES F. FINDLAY
Attorney for Petitioner
State Bar No. 298350

Suite D
1557 Gordon Highway
Augusta, Georgia 30906
(404) 736-7141

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8622

D. C. Docket No. CV185-028
DO NOT PUBLISH

RAEFORD D. WADE,

Plaintiff-Appellant,

RUBEN PACE, JR.,

Plaintiff,

versus

THE SECRETARY OF THE ARMY,
THE DEPARTMENT OF THE ARMY,
THE EISENHOWER ARMY MEDICAL CENTER, FORT GORDON, GEORGIA, and THE U. S. ARMY SIGNAL CENTER, FORT GORDON, GEORGIA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(October 31, 1991)

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

---

* Honorable Jesse E. Eschbach, Senior Circuit Judge, U. S. Court of Appeals for the Seventh Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. *See* Circuit Rule 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: October 31, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: NOV 22 1991

APPENDIX II

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

RAEFORD D. WADE	*	
VS		
THE SECRETARY OF THE ARMY, THE DEPARTMENT OF THE ARMY, THE EISENHOWER ARMY MEDICAL CENTER, FORT GORDON, GEORGIA AND THE U. S. ARMY SIGNAL CENTER, FORT GORDON, GEORGIA	*	CV185-028
	*	(Filed May 30, 1990)
	*	

JUDGMENT

This action came on for non-jury trial before the Court, Honorable Dudley H. Bowen, Jr., United States District Judge, presiding and the defendants having moved for a Directed Verdict,

IT IS ORDERED AND ADJUDGED that the Court having granted a directed verdict for defendants, that the plaintiff take nothing, that the action be dismissed on the merits and that the defendants, THE SECRETARY OF THE ARMY, THE DEPARTMENT OF THE ARMY, THE EISENHOWER ARMY MEDICAL CENTER, FORT GORDON, GEORGIA AND THE U.S. ARMY SIGNAL CENTER, FORT GORDON, GEORGIA, recover of the plaintiff, RAEFORD D. WADE, their costs of this action.

DATED at Augusta, Georgia this 30th day of May, 1990.

HENRY R. CRUMLEY, JR., CLERK

By: /s/ Scarlett B. Collins
Deputy Clerk

APPROVED: /s/ D H Bowen, Jr.
DUDLEY H. BOWEN, JR., JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

I, LEONARD M. TUGGLE, JR., hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been duly mailed to the Honorable David M. Sounders, Department of Justice, Civil Rights, 10th and Pennsylvania Avenue, Washington, D.C. 20530, by depositing the same in the United States Mail with sufficient postage attached there.

This ___ day of February, 1992.

LEONARD M. TUGGLE, JR.
ATTORNEY FOR PETITIONER

POST OFFICE BOX 204354
MARTINEZ, GEORGIA 30917
(404) 860-6966

JAMES F. FINDLAY
ATTORNEY FOR PETITIONER

SUITE D
1557 GORDON HIGHWAY
AUGUSTA, GEORGIA 30906
(404) 736-7141